

STATE OF MICHIGAN
COURT OF APPEALS

HELEN RANDOLPH,

Plaintiff-Appellant,

v

CLEMAN GIVAN,

Defendant-Appellee.

UNPUBLISHED
September 3, 2002

No. 233104
Wayne Circuit Court
LC No. 00-004435-NI

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition in this automobile negligence action. We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sustained injuries in an automobile accident that occurred on March 8, 1999. Plaintiff had parked her vehicle and exited it when she was struck by defendant's truck while she was walking toward the sidewalk. Plaintiff testified that the truck's side view mirror hit the back of her head and neck and that her left hand hit the right front panel or bumper of defendant's truck. Defendant conceded that his side view mirror hit something, causing the mirror to fold back. The impact caused plaintiff to fall face down onto the ground. She experienced dizziness, nausea, and facial swelling. Approximately two hours after the accident, plaintiff presented to Henry Ford Hospital. The medical records indicate that plaintiff was struck in the left side of the neck and that she was knocked to the ground.

Plaintiff began treating with a chiropractor, Dr. Jeffrey Eisman, on March 12, 1999. She complained of neck pain, upper back pain, and left arm weakness and numbness. Dr. Eisman's diagnoses included sprain to CT spine, headaches, and subluxations (partial dislocation) in C7. On May 20, 1999, plaintiff underwent an independent medical examination done by Dr. Bala Prasad. She complained that her neck hurt upon movement, which limited her range of motion by fifty percent. She also complained of pain upon palpation to the trapezius and in her back across the shoulders. Dr. Prasad believed that plaintiff's symptoms and limitations were related to her chronic rheumatoid condition. On October 19, 1999, plaintiff consulted Dr. Craig Hysni for complaints of neck and shoulder pain and headaches. She also complained of occasional numbness, tingling, and weakness in the arms. Dr. Hysni simply diagnosed neck pain.

On January 7, 2000, plaintiff went to Bon Secours Hospital because she experienced left orbital numbness and that was quickly followed by a twitching sensation radiating to her left face, left shoulder, and eventually to her entire left arm. Dr. Boris Leheta, who performed the evaluation, concluded that plaintiff's "transient neurological event" was "most consistent with that of a possible simple partial seizure, especially in light of the traumatic blunt head trauma episode in March 1999."

Plaintiff filed her complaint on February 11, 2000, against defendant. Defendant subsequently moved for summary disposition under MCR 2.116(C)(10), asserting that plaintiff's injuries were not objectively manifested or serious and did not constitute a serious impairment of body function. The trial court ruled that plaintiff failed to present a material factual dispute regarding whether plaintiff's alleged closed head injury constituted a serious impairment of body function and that plaintiff failed to present sufficient evidence that the alleged closed head injury was caused by the accident.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual support of the complaint, *id.* at 120, and in evaluating such a motion, the trial court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Maiden, id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

A person is subject to tort liability for automobile negligence if the injured person "suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). Because the statutory definition of serious impairment of body function is the same as that adopted in *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982), it is appropriate to refer to *Cassidy* and cases decided thereunder in resolving this case. *Kern v Blethen-Coluni*, 240 Mich App 333, 342; 612 NW2d 838 (2000).

Whether a person suffered a serious impairment of body function is a question of law for the court if there is no factual dispute about the nature and extent of the plaintiff's injuries or there is a factual dispute but it is not material to the determination whether the plaintiff suffered a serious impairment of body function. MCL 500.3135(2)(a). If a closed head injury is involved, "a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury." MCL 500.3135(2)(a)(ii).

Plaintiff first claims that the trial court erred in dismissing her claim as it relates to her alleged closed head injury because under the statute, a closed head injury need not be objectively manifested in order to create a jury-submissible issue. Under § 3135(2)(a)(ii), diagnosis of a closed head injury alone is insufficient to create a question of fact. *Churchman v Rickerson*, 240 Mich App 223, 229; 611 NW2d 333 (2000). The physician's affidavit "must contain testimony that a plaintiff may have sustained a serious neurological injury." *Id.* at 231.

Dr. Leheta averred in his affidavit that plaintiff's symptoms were "signs of a transient neurological event consistent with a possible simple partial seizure." Dr. Leheta further averred that a simple partial seizure may indicate a serious neurological injury. Here, Dr. Leheta's affidavit contains proposed testimony that plaintiff may have sustained a serious neurological injury, thus, a question of fact for the jury was created with respect to plaintiff's alleged closed head injury. MCL 500.3135(2)(a)(ii). Moreover, Dr. Leheta's averment that he believed that the diagnosis of possible simple partial seizure is consistent with the blunt head trauma suffered in March of 1999, in conjunction with plaintiff's testimony that she was struck in the back of the head and neck with the side view mirror and the other medical history showing that plaintiff was struck in the left neck area and fell to the ground, is sufficient to raise a material factual dispute regarding whether the automobile accident caused plaintiff's closed head injury.

Accordingly, we conclude that the trial court erred in granting summary disposition to defendant with respect to the alleged closed head injury because there are material factual disputes whether plaintiff has a serious neurological injury and whether that injury was caused by the automobile accident in this case.

Plaintiff next contends that the trial court erred in ruling that her other injuries did not meet the serious impairment threshold. It appears that the trial court did not specifically address this issue, focusing instead on the head trauma aspect of the case. Because plaintiff raised the issue below and on appeal, the trial court's failure to address it does not preclude appellate review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Taking the evidence in a light most favorable to the plaintiff, she had objectively manifested injuries, that being x-rays showing subluxation of the spinal vertebrae. That injury affected plaintiff's ability to move her back and neck, which are important body functions. *Mekler v Bigham*, 147 Mich App 716, 720; 383 NW2d 95 (1985). Although plaintiff said she could not bend or do heavy lifting, that she did not sleep well, and that she required temporary assistance with housework, she has not shown that the effect of her other injuries was such as to cause a significant impact on her ability to live a normal life. *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984).

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Janet T. Neff

/s/ Kathleen Jansen